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No. _____

In The
Supreme Court of the United States

RAFAL FILIPCZYK,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has the authority to address and decide matters, which a trial court dismissed for lack of subject matter jurisdiction?

2. Travel Expense Act, 5 U.S.C. § 5701 *et seq.*, provides that federal employees traveling on official government business are entitled to lodging expenses. May a government agency refuse to reimburse an employee and offer government quarters, including inadequate quarters, in lieu of monetary compensation solely to save travel funds?

3. Given the current statutory and regulatory scheme, 5 U.S.C. § 5911(e), and the implementing Office of Management and Budget regulations, under what circumstances may federal employees traveling on official government business be required, compelled or coerced to occupy government quarters, including inadequate quarters?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Rafal Filipczyk, petitions for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Court of Appeals' opinion, *Filipczyk v. United States*, case No. 2010-5009, is unpublished, 2010 WL 2710635, Petitioner's Appendix ("Pet. App.") A1-A13. The opinion of the Court of the Federal Claims ("trial court") is reported as *Filipczyk v. United States*, 88 Fed. Cl. 776 (2009), Pet. App. B1-B27.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 2010. The petition for rehearing en banc was denied on October 1, 2010, Pet. App. C1-C2. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals for the Federal Circuit had jurisdiction under 28 U.S.C. § 1495(a). The Court of Federal Claims had jurisdiction under 28 U.S.C. § 1491(a)(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 1491(a)(1) of Title 28 of the United States Code defining jurisdiction of the Court of Federal Claims reads in the relevant part:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

Section 1495(a) of Title 28 of the United States code defining jurisdiction of the Court of Appeals for the Federal Circuit reads in the relevant part:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

...

(3) of an appeal from a final decision of the United States Court of Federal Claims;

Section 5702 of Title 5 of the United States Code, provides in the relevant part:

Per diem; employees traveling on official business

(a)(1) Under regulations prescribed pursuant to section 5707 of this title, an employee, when traveling on official business away from the employee's designated post of duty, or away from the employee's home or regular place of business (if the employee is described in section 5703 of this title), is entitled to any one of the following:

(A) a per diem allowance at a rate not to exceed that established by the Administrator of

General Services for travel within the continental United States, and by the President or his designee for travel outside the continental United States;

(B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States or an amount established by the President or his designee for travel outside the continental United States; or

(C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

(a)(2) Any per diem allowance or maximum amount of reimbursement shall be established, to the extent feasible, by locality.

The relevant regulation implementing the statue, 41 CFR § 301-11.3, reads:

Must my agency pay an allowance (either a per diem allowance or actual expense)?

Yes, unless:

(a) You perform travel to a training event under the Government Employees Training Act (5 U.S.C. 4101-4118), and you agree not to be paid per diem expenses; or

(b) You perform pre-employment interview travel, and the interviewing agency does not authorize payment of per diem expenses.

Section 5911(e) of Title 5 of the United States Code, provides:

The head of an agency may not require an

employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise.

"Rental quarters" are defined in the Office of Management and Budget ("OMB") Circular A-45. Section 6(j) reads:

Rental quarters. Except as specifically excluded herein or by statute, the term "rental quarters," includes all furnished and unfurnished quarters supplied under specific Government authority to Government employees, contractors, contractor employees, and all other persons to whom housing is provided as an incidental service in support of Government programs. It includes, but is not limited to, Government -owned or -leased dwellings, apartments, bunkhouses, dormitories, trailer pads, cabins, guard stations and lookouts, mobile homes, house trailers, and housekeeping as well as nonhousekeeping units. The term excludes tents, containers, housing which due to extreme deterioration is unsuitable for occupancy except in exigent circumstances, and "public quarters" designated for occupancy by members of the uniformed services with loss of allowances, but it includes quarters occupied by such personnel on a rental basis under 37 U.S.C. Section 403(e), 42 U.S.C. subsection 1594a(f) and 1594b, and other authorities.

The contested provision of the Collective Bargaining Agreement, Article 24, Section 13 reads:

Employees assigned TDY aboard Government ships may utilize, as appropriate, Government or commercial quarters ashore after the ship has been in port during stopovers for forty-eight (48) consecutive hours. For the purpose of this section, in port time begins at 0001 local time on the day the ship arrives. In port time shall be considered as continuous unless interrupted by a voyage in excess of thirty-six (36) hours. If the port is a U.S. Military installation and adequate Government quarters are available at that installation but not used, the payment of the quarters portion of the per diem will be at the rate for Government quarters, unless the employee is otherwise exempted from use of Government quarters. SNRs[1] are authorized to verify the availability or nonavailability of adequate Government quarters. Claims for reimbursement for lodgings must be accompanied by receipts or other acceptable proof of occupancy.

The remaining statutes and regulations are reproduced in Appendix D.

STATEMENT OF THE CASE

This is a Tucker Act lawsuit for monetary damages with a maritime flavor. I am an employee of the Naval Oceanographic Office ("NAVOCEANO"). As part of my job, I am routinely assigned survey

1 SNR stands for Senior NAVOCEANO Representative

duty aboard NAVOCEANO oceanographic ships. Usually, I participate in two surveys a year. A regular survey lasts thirty-one days with a port call of five days (four nights) between two consecutive surveys. NAVOCEANO employees fly to locations worldwide an embark the survey ships. In 2003 the Management and the Union representing NAVOCEANO employees negotiated a Collective Bargaining Agreement ("CBA") provision, which provided that employees would not be reimbursed for lodging expenses during the first forty-eight hours a ship were in port. Simultaneously NAVOCEANO Commanding Officer issued a regulation to the same effect covering employees not represented by the Union. The provision is not in any way duty-related, i.e. employees do not have to be present aboard the ships during the night hours covered by the provision.

On July 28, 2007 I flew to Saipan to participate in three consecutive oceanographic surveys aboard the United States Naval ship Bowditch. On September 24 the Bowditch came to port in Naha, Japan. I rented a hotel room for three nights September 24-27. On October 22, the Bowditch docked in Sasebo, Japan. I spent two nights in government quarters on a naval base. Upon returning from my deployment, I claimed lodging expenses but NAVOCEANO refused to reimburse me $ 175.15 for the three nights covered by the CBA provision (Sept. 24 and Oct. 22-23).

In March of 2008 I filed an appeal with the United States Civilian Board of Contract Appeal ("Board"). I claimed violation of 5 U.S.C. § 5702(a)(1)-

(2), 5 U.S.C. § 5911(e), 41 CFR § 301-11.3, and Department of Defense ("DoD") Instruction 4165.63-M, Housing Management Manual ("Housing Manual"), which establishes the minimum standards of government quarters for civilian DoD employees. My claim was dismissed for lack of subject matter jurisdiction pursuant to 5 U.S.C. § 7121, which provides that a grievance is the only administrative means of settling disputes when the CBA is in effect. I filed a request for reconsideration claiming that matters explicitly provided for by a federal statute are excluded from the definitions of grievance procedure and conditions of employment and consequently within the Board jurisdiction, 5 U.S.C. § 7103(a)(12) and (a)(14). The Board changed one sentence of its opinion but did not change the jurisdiction decision.

On September 11, 2008 I filed a lawsuit in the United States Court of Federal Claims ("CFC") invoking its jurisdiction under the Tucker Act and the Remand Act of 1972, 28 U.S.C. 1491(a)(1)-(2). I asked the CFC to vacate the Board's jurisdiction decision on my statutory violation claim, and to remand the matter to the Board. The CFC ruled on January 13, 2009 that it did not have a subject matter jurisdiction to grant injunctive relief because I had not asked for monetary award. Pet. App. B4.

On January 20, I filed the second lawsuit at the CFC. Pet. App. E1-E4. Invoking jurisdiction under the Tucker Act, I sought a monetary award and also review of the administrative record, i.e. the Board's jurisdiction decision. In my complaint I claimed violation of 5 U.S.C. § 5911(e), 5 U.S.C. 5702(a)(1)

and (a)(2), 41 CFR 301-11.3, and the DoD Housing Manual. I also claimed violation of Federal Standards Labor-Management Relations Act ("FSLMRA"), 5 U.S.C. § 7103(a)(12), (a)(14) and § 7117(a)(1), which provide that matters explicitly covered by federal statute, end excepted from definition of the conditions of employment may not be negotiated over and also that CBA provisions may not violate government-wide regulations. The CFC ruled on September 2, 2009 that it did not have jurisdiction over my 5 U.S.C. § 5911(e), FSLMRA, and Housing Manual Claims as they were not money-mandating provisions. The court also ruled that even if it had jurisdiction over my 5911(e) claim, the government would have been entitled to summary judgment. As to my remaining claims, the CFC granted summary judgment to the Government. Pet. App. B27.

In October of 2009, I filed an appeal with the Court of Appeals for the Federal Circuit. I appealed the CFC judgment in its entirety, the jurisdiction and the summary judgment rulings. The court of appeals reversed the trial court's jurisdiction decisions ruling that the CFC had jurisdiction over all my claims, but that the trial court did not have jurisdiction to enjoin NAVOCEANO from enforcing the CBA. The court of appeals also affirmed the trial court's summary judgment decisions as to my 5 U.S.C. § 5911(e), 5 U.S.C. § 5702(a)(1)-(2) and 41 § CFR 301-11.3 claims. The Court of Appeals addressed *sua sponte* my Housing Manual claim (dismissed by the CFC for lack of subject matter jurisdiction) and ruled that the Government would

have been entitled to summary judgment. Pet. App. A11-A12.

On July 29, 2010 I filed a petition for rehearing en banc, which was denied on October 1, 2010. Pet. App. C1-C2.

REASONS FOR GRANTING THE PETITION

This petition was filed because the two lower courts, which considered my case, refused to follow and violated this Court's precedents (*Neztsosie* and *Chevron)* and also refused to enforce valid regulations implementing the statutes. Federal employees traveling on official business should have access to adequate quarters and should be reimbursed for lodging expenses. This is an important issue affecting thousands of employees. Over the years Congress, the Office and Management and Budget ("OMB"), and the General Services Administration designed a comprehensive scheme of statutory and regulatory provisions, which protects federal employees against being forced to occupy inadequate quarters while on temporary duty assignments, and also against being forced to subsidize official travel. In 1964 Congress enacted a law (part of Pub. L. 88-459) now coded as 5 U.S.C. § 5911(e) which was intended to protect employees on temporary duty against being forced into occupying inadequate quarters. In 1983 this Court issued an opinion in *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89 (1983). That case covered per diem expenses for union officials traveling to participate in Collective

Bargaining Agreement negotiations. However, the fact that this Court took that case indicates that the issue of per diem expenses was important. In the case argued here the Court of Appeals affirmed and expanded the opinion of the trial court broadly ruling that federal "agencies have wide discretion in authorizing travel allowances that they determine to be in the best interest of promoting United States official business." This amounted to implicit repeal of several regulatory provisions implementing the statutes. The Court of Appeals affirmed the trial court's ruling that a federal agency may set lodging per diem rates to zero and offer inadequate government quarters in lieu of monetary reimbursement. This Court recognized in *Aguilar v. Standard Oil*, 318 U.S. 724, 734-735 (1943) that persons working on the ships warrant special consideration and stated that in certain circumstances "the superfluous is the necessary...to make life livable". Id at 734.

The only Court of Appeals having the appellate jurisdiction over the Tucker Act cases is the Court of Appeals for the Federal Circuit. Therefore, a disagreement between different courts of appeals is not a factor here. In the course of deciding my appeal the Court of Appeals disregarded important precedents of this Court and upheld the trial court's interpretation of 5 U.S.C. § 5702(a)(1), which was based on a non-sequitur (fallacy of undistributed middle) argument. Both courts looked at my case and decided that NAVOCEANO employees working on the ships, who just spent thirty days at sea, often in

bad weather, are not entitled to lodging expenses when a ship is in port for the first forty-eight hours.

I. The Court of Appeals did not have the authority to address the matter not properly before it on appeal.

The Trial Court dismissed for lack of subject matter jurisdiction my DoD Housing Manual claim. The Court of Appeals reversed the jurisdiction decision, took up that claim *sua sponte* on the merits, and ruled that the Government would have been entitled to summary judgment as to my claim. The supervisory power of this Court is invoked under Rule 10(a).

A. The courts of appeals do not have jurisdiction to entertain and decide on the merits matters the trial courts dismissed for lack of subject matter jurisdiction.

The courts of appeals have appellate jurisdiction. They do not have the power to grant summary judgments. They can only review, affirm, reverse, modify, and vacate the judgments of the trial courts. This follows from the plain language of 28 U.S.C. § 1491(a)(1) conferring jurisdiction on the CFC and 28 § U.S.C. 1495(a) granting *appellate* jurisdiction on the Court of Appeals for the Federal Circuit: "The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction [...] of an *appeal* from a final decision of the United

States Court of Federal Claims." 28 U.S.C. § 1495(a) (emphasis added). If a Tucker Act action is filed at the CFC, only the CFC has "jurisdiction to *render judgment* upon any claim against the United States". 28 U.S.C. § 1491(a)(1) (emphasis added). My Housing Manual claim, a separate claim founded on the money mandating statute and regulation, was not decided on the merits by the trial court. As there was no trial court's judgment on the merits, the Court of Appeals had no power to review the merits or to render judgment on the merits. A simple application of *expressio unius est exclusio alterius* rule of statutory construction to both jurisdictional statutes is sufficient to conclude that the courts of appeals do not have jurisdiction to grant summary judgments.

I urge this Court decide the jurisdictional question. In *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 480 (1999), this Court avoided deciding the theoretical status of the cross-appeal rule (addressed below). As my case shows, the Court of Appeals did not take the cross-appeal rule seriously.

B. The Court of Appeals violated the cross-appeal rule and the principle of party presentation.

The Government did not file a cross-appeal. It did not ask the Court of Appeals to grant summary judgment as to my Housing Manual claim. "The power of an appellate court to modify a decree in equity for the benefit of an appellee in the absence of a cross-appeal is here to be admeasured." *Morley*

Construction Co. v. Maryland Casualty Co., 300 U. S. 185, 187 (1937). The cross-appeal rule dates back to *McDonough v. Dannery*, 3 Dall. 188, 198 (1796). This Court has never endorsed a departure from this rule. *Greenlaw v. United States*, 554 U.S. 237 (2008). I won the reversal of the trial court's jurisdiction decision. The Government benefited from that reversal. Modifying the judgment of the trial court for the benefit of the non-appealing party is prohibited. *Neztsosie* at 480. The rule is "firmly entrenched", *Greenlaw* at 243, and "inveterate and certain", *Morley Constr.* at 191.

The Court of Appeals also violated the principle of party presentation.

> "In our adversary system, in both civil and criminal cases, in the first instance and *on appeal*, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."

Greenlaw at 242 (emphasis added).

> "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."

Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia J., concurring in part and concurring in judgment). "This must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant [...]". *United States v.*

Samuels, 808 F.2d 1298, 1301 (CA8 1987) (R. Arnold, J., concurring in denial of rehearing en banc).

The Court of Appeals gave several reasons for its granting summary judgment to the Government. Pet. App. A12. However, since the issue was argued on the merits neither by me nor by the Government before the Court of Appeals, the Court did not have the full record. It only had my Complaint and the trial court's decision, which did not address the issue on the merits. The Court of Appeals argued the matter as if it was representing the Government questioning the substantive adequacy of my Complaint. In fact, it appears from the Court's reasoning that it believed that I failed to state the claim upon which the relief could be granted. This violated the principle of party presentation.

II. The petition should be granted to confirm that the lower courts may not disregard binding precedents of this Court.

While deciding my case both courts engaged in their own interpretation of federal statutes instead of either deferring to the interpretation of the agencies empowered to do it by Congress or invalidating the appropriate regulations. By doing so, they disregarded this Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). No decision of this Court has been quoted more frequently that the *Chevron* decision.

A. Federal employees traveling on official government business are entitled to lodging expenses. 5 U.S.C. § 5702(a).

The lower courts and the Government believe that an employee traveling on official business is not necessarily entitled to monetary compensation for lodging expenses incurred. Instead, employees may be offered government quarters, including inadequate ones and refused compensation.

The courts' and the Government's theory is based on the pre-1975 version of 5 U.S.C. § 5702 and the 1975 decision of the Court of Claims, *Boege v. United States*, 206 Ct. Cl. 560 (1975). The lawsuit in that case was also filed by NAVOCEANO employees. The pre-1975 version of 5 U.S.C. § 5702 read:

> "An employee, while traveling on official business away from his designated post of duty, is entitled to a per diem allowance prescribed by the agency concerned."

In 1975 and 1986 Congress amended § 5702, removed words "prescribed" and "agency" and granted the Administrator of General Services, and the President the authority to prescribe maximum per diem rates for continental United States and for areas outside the continental United States, respectively. The President, through executive orders, delegated the authority to the Secretary of State and the Secretary of Defense. Congress also provided that the Administrator of General Services shall issue regulations implementing the statute. 5

U.S.C. § 5707. In subsection 5702(a)(2) Congress mandated that the maximum per diem rates are to be set by locality. Based on the facts above, the trial court ruled that the individual agencies continue to have discretion to prescribe per diem rates, Pet. App. B25. One of a series of regulations implementing the statute reads:

> "Must my agency pay an allowance (either a per diem allowance or actual expense)?
> Yes, unless:
> (a) You perform travel to a training event under the Government Employees Training Act (5 U.S.C. 4101-4118), and you agree not to be paid per diem expenses; or
> (b) You perform pre-employment interview travel, and the interviewing agency does not authorize payment of per diem expenses."

41 CFR § 301-11.3 (2007). The trial court ruled that this regulation does not mandate reimbursement. Pet. App. B26-B27. The court relied on *Boege* case, which interpreted the pre-1975 § 5702. In *Boege*, the Court of Claims held that the agencies had discretion to prescribe per diem rates. Even though the statute changed, the Trial Court ruled that the agencies continue to have discretion to set per diem rates. Pet. App. B26-B27.

The *Boege* court was not correct in its interpretation of the pre-1975 § 5702. Having discretion to set per diem rates does not mean that the agencies have discretion to eliminate the entitlement provided by the statute altogether and replace it with

a different benefit – government quarters. When per diem rates are set to zero, employees are in effect not entitled to lodging allowance. This contradicts the first part of the old statute.

The Court of Appeals broadened the trial court's ruling and held that "agencies have wide discretion in authorizing travel allowances that they determine to be in the best interest of promoting United States official business." Pet. App. A13. This language is nowhere to be found in the text of the statute or in the implementing regulations. Given that the words "agency" and "discretion" were removed from the new statute, it is not reasonable to conclude that Congress, by removing these words, intended the individual agencies to continue to have discretion to set per diem rates.

Besides relying on the wrong statute, both courts interpreted the new version of § 5702 on their own instead of looking at the statute through the implementing regulations, 41 CFR § 301-11.1 through § 301-11.99, as this Court's decision in *Chevron* mandates. By doing so the trial court and the Court of Appeals followed the wrong rule of law. *Chevron* teaches that the courts must defer to agency interpretation of the statute unless they find the interpretation to be unreasonable. It is clear from the trial court's decision, Pet. App. B24-B25, that it interpreted the statute on its own. The trial court explains that 41 CFR § 301-11.3 does not mandate payment of lodging expenses because that would be contrary to the its own interpretation of the statute,

which the Court explained on earlier pages of its opinion, Pet. App. B26. The Court of Appeals did not explain its position but only stated that it agreed with the Trial Court's interpretation of § 5702.

The trial court's reasoning was based on a *non-sequitur* argument. The court held that the agencies have discretion to set per diem rates because the the Administrator of General Services, Secretary of State, and the Secretary of Defense have discretion to set maximum per diem rates. Pet. App. B25. The precise logical fallacy, the trial court committed is known as the fallacy of undistributed middle (Example: All cats are mammals. All dogs are mammals. Therefore, all cats are dogs.) The discretion of the Secretary of State to set maximum per diem rates for foreign areas does not transfer on the individual agencies. Or alternatively, the fact that the State Department is a federal agency and has discretion to set maximum per diem rates for all federal employees traveling on official business does not mean that NAVOCEANO, another agency, has that discretion. A different way to look at this issue is to employ the well known rule of statutory construction: e*xpressio unius est exclusio alterius.* The same rule applied to section 5702(a) implies that quarters may not be provided in lieu of monetary reimbursement. They may only be offered to an employee. The only exception is 5 U.S.C. § 5911(e), which will be discussed below.

The eligibility of per diem reimbursement is defined in 41 CFR § 301-11.1.

"When am I eligible for an allowance (per diem

> or actual expense)?
> When:
> (a) You perform official travel away from your official station, or other areas defined by your agency;
> (b) You incur per diem expenses while performing official travel;
> and
> (c) You are in a travel status for more than 12 hours.

Since I incurred lodging expenses, I was per regulation above entitled to reimbursement.

Most federal employees are reimbursed through lodgings-plus method. 41 CFR §§ 301-11.5(a), 301-11.100 (2007). Under this method an employee is paid "actual lodging cost not to exceed the maximum lodging rate for the TDY location or stopover point" (the maximum rate set by the Secretary of State). This is the amount I claimed for lodging expenses and my agency refused to reimburse me. Another method, reduced per diem, 41 CFR § 301-11.300, has not been invoked by the Government as the reason for refusing reimbursement and consequently could not have been raised defensively on appeal. *Arbaugh v. Y. & H. Corp.*, 546 U.S. 500, 502 (2006). The Government did not invoke that provision on appeal.

It is clear that, had both courts followed *Chevron* decision and deferred to the regulations, the outcome of my case must have been different. The officials that have discretion to set maximum per diem rates

must also comply with 5 U.S.C. § 5702(a)(2), which mandates that the rates be set by locality, not the duty station. This subsection is implemented by 41 CFR § 301-11.7 (2007), which reads in the relevant part:

> "What determines my maximum per diem reimbursement rate?
> Your TDY location determines your maximum per diem reimbursement rate."

The trial court again tried to interpret the statute on its own instead of deferring to the regulation, which is unambiguous. Pet. App. B25-26. My agency negotiated with the Union zero per diem rates irrespective of the locality and tied to duty stations – the ships. This is not allowed. The Court of Appeals did not address this part of my claim at all.

Because of the unambiguous language of 41 CFR 301-11.3 (above at 17 and 18) the judgment of the Court of Appeals on my 5 U.S.C. § 5702(a)(1) claim warrants summary reversal. Both courts simply refused to enforce the regulation. The Government presented no defense, which would show that an exception to the regulation's mandatory language applies to my case. As the regulation is entitled to *Chevron* deference, the trial court's options were very limited: either the enforcement of the regulation or its invalidation. The Government however did not argue at any time that the regulation is invalid. The Court of Appeals did not even addressed it. This Court should also note that the word "*Chevron*" is nowhere to be found in both courts' opinions even

though I relied on this Court's ruling in that case in *all* my briefs. As the regulation is government-wide, 5 U.S.C. § 7117(a)(1) applies and precludes any CBA provision, which is inconsistent with the regulation.

B. Federal employees traveling on official government business may not be required, compelled, or coerced in any way to occupy government quarters unless the occupancy is necessary to accomplish employee's mission.

The Trial Court and the Court of Appeals interpreted 5 U.S.C. 5911(e) on their own disregarding the regulation implementing the statute and issued by the Office of Management and Budget ("OMB"). The OMB has the authority to issue the regulation under 5 U.S.C. § 5911(f) and the Executive Order 11609. The relevant regulations are contained in the OMB Circular A-45 §§ 6(j) and 9(h), Pet. App. at D1. Section 9(j) defines "rental quarters" as "all furnished and unfurnished quarters supplied under specific Government authority to Government employees [...] as an incidental service in support of Government programs." Shipboard quarters are not on the list of quarters excluded from the definition. *Id.* Section 9(h) mandates that, if occupancy of government quarters is required, the agency must issue regulations specifying the conditions and must comply with § 5911(e) limitations. Pet. App. D1.

I claimed that the CBA and NAVOCEANO regulation provision denying reimbursement of lodging expenses during the first forty-eight hours a

ship is in port, violated § 5911(e). In the course of the litigation the Government never claimed that occupancy of shipboard quarters during the first forty-eight hours a ship was in port was duty-related or that the required by § 5911(e) determination was made by the agency head. The Trial Court and the Court of Appeals disagreed holding that when government quarters are provided free of charge the statute does not apply. Pet. App. B18-B21 and A10-A11. I argued that this holding would require invalidating the OMB regulation but both courts refused to do so. This Court's *Chevron* decision requires, however, that the courts either defer to agency's regulation or invalidate it as unreasonable. The courts applied the wrong rule of law.

The OMB Circular A-45 § 6(j) makes a clear distinction between "public quarters" provided to uniformed members "with loss of allowances" and quarters provided to civilian employees. The latter are "rental quarters" and the former are not. My argument before both lower courts was based on the reasoning that, since federal employees traveling on official business must be reimbursed for lodging expenses, all quarters are in fact provided to them free of charge by the government. If the government provides quarters directly and an employee occupies the quarters, he or she forfeits the lodging allowance. In both cases the government ends up paying for the quarters and an employee never pays out of his or her own pocket.

The Trial Court's ruling was based on *Boege*

decision, where the Court of Claims made a distinction between quarters provided on "rental basis" and quarters provided free of charge. *Boege* at 564. The Court ruled that shipboard quarters are not provided "on rental basis" but free of charge. The Court, however, did not discuss the fact that the employees lose housing allowance when staying in government quarters. In 1965 the Comptroller General issued an opinion discussing this precise issue, *Secretary of the Air Force,* B-156187, 44 Comp. Gen. 626, 630 (Apr. 15, 1965) ("*SAF*"). In that opinion, based on careful review of the legislative history of § 5911(e), the Comptroller General ruled that all quarters provided to civilian employees fall under the limitation of § 5911(e). The opinion points to the definition of "rental quarters" of the OMB Circular A-45. The *Boege* decision was issued before this Court's *Chevron* ruling. In view of *Chevron* the Court of Claims' approach in *Boege* is incorrect.

When the OMB issued the regulation of Circular A-45 implementing the statute, it must have taken into account the Congress's intent which was to protect employees on temporary duty from being forced into inadequate quarters. This is pointed out in *SAF* opinion at 629: "there apparently were many instances where civilian employees were required to occupy inadequate government quarters while on temporary duty." This Court ruled in numerous cases that "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." See e.g. *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990) (internal quotations omitted). In

my case both lower courts would not look into the purpose of the statute but focused on the term "rental basis".

In summary, under *Chevron*, the lower courts are not allowed to interpret § 5911(e) on their own because of the existence of the regulation implementing the statute. The courts must either defer to the OMB's interpretation or invalidate the regulation as unreasonable. As both courts failed to do that, they violated this Court's precedent.

1. Lower Courts' interpretation of 5 U.S.C. § 5911(e) conflicts with the interpretation of the Comptroller General, the Office of Management and Budget, the General Services Administration, and the Federal Labor Relations Authority.

The OMB's and the Comptroller General's interpretation of § 5911(e) was discussed above. When issuing regulations implementing the Travel Expense Act, the General Services Administration did take into account § 5911(e). One of the Federal Travel Regulations provisions gives federal employees on official travel an explicit choice of quarters. Section 301-11.12 states: "How does the type of lodging *I select* affect my reimbursement?" (emphasis added, remaining parts omitted, see Pet. App. D7). Clearly, it is an employee who selects the type of lodging, not an agency.

In September of 2000 the GSA Office of

Governmentwide Policy responded to the DoD request of July 31, 2000, memorandum requesting a waiver of a Federal Travel Regulation § 301-11.11 (2000). That section read:

> "May I stay in a lodging facility of my choice? Yes. You are encouraged to stay in lodging facilities that have been approved by FEMA as ``approved accommodations''. To ensure that you are staying in an approved facility, given the best available choices and/or obtaining Government discount rates, you are further encouraged to make lodging arrangement through your agency's TMS."

Mr. William Rivers, the Director of Travel Management Policy responded as follows:

> "GSA is unable to grant your waiver request at this time, as such a waiver would be Contrary to the statutory language and intent of 5 U.S.C. S591[1](e). A review of the legislative history and decisions of the Comptroller General reveal that it was the clear intent of Congress in enacting 5 U.S.C. S5911(e) that employees not be forced to occupy Government quarters on a rental basis. While your proposal would not force the occupancy of Government quarters, per se, employees would in effect be penalized for not choosing to stay in Government quarters, as their travel reimbursement would be reduced and they would be forced to pay out of pocket expenses

> to cover the extra costs of the commercial lodging.
> Therefore, this waiver cannot be granted, as it would have the de facto effect of forcing Employees to choose Government quarters, contrary to 5 R.S.C. S5911(e)."

See Pet. App. D9-D10 for the full text of the GSA response. The document quoted above is available at http://www.cpol.army.mil/library/benefits/ben092100-gsa.html (12/19/2010).

In 1986 the FLRA issued an opinion in *National Park Service v. Police Association of the D.C.*, 21 FLRA 189 (March 27 1986). In that case FLRA upheld an arbitrator's award and agreed with the arbitrator's findings on § 5911(e). The arbitrator found that the intent of the statute was "to afford employees in a temporary duty travel stat|u|s some degree of freedom to choose their own accommodations and to protect them from being forced into inadequate quarters." This is in perfect agreement with 41 CFR 301-11.12, which explicitly allows the employees to choose lodging facilities.

CONCLUSION

Based on foregoing arguments, the petition should be granted.

Dated: December 27, 2010

Rafal Filipczyk
Petitioner

APPENDIX

APPENDIX A

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

RAFAL FILIPCZYK,
Plaintiff-Appellant,
v.
UNITED STATES,
Defendant-Appellee.

2010-5009

Appeal from the United States Court of Federal Claims in case no. 09-CV-045, Judge Thomas C. Wheeler.

Decided: June 22, 2010

RAFAL FILIPCZYK, of Diamondhead, Mississippi, pro se.

ANTONIA R. SOARES, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for defendant-appellee. With her on the brief were TONY WEST, Assistant Attorney General, JEANNE E. DAVIDSON, Director, and ALAN J. LO RE, Assistant Director. Of counsel was ROBERT E.

YOUNG, Navy General Counsel Office, United States Department of the Navy, of Stennis Space Center Mississippi.

Before RADER, Chief Judge, LINN and PROST, Circuit Judges.

PER CURIAM.

Rafal Filipczyk appeals the United States Court of Federal Claims' the dismissal of his request for lodging expense reimbursement due to lack of jurisdiction, and in the alternative, summary judgment in favor of the Government action denying his request. Because we agree that Mr. Filipczyk is not entitled to the requested reim-bursement as a matter of law, we affirm the summary judgment of the Court of Federal Claims.

BACKGROUND

Mr. Filipczyk is a civilian employee of the Naval Oceanographic Office ("NAVOCEANO"). He is regularly assigned temporary duty aboard naval ships traveling across open waters and docked in foreign ports. Certain terms of Mr. Filipczyk's employment conditions are governed by a Collective Bargaining Agreement ("CBA") between his employer, NAVOCEANO, and his labor union, American Federation of Government Employees Local 1028. One such term is that NAVOCEANO does not reimburse employees for lodging costs

incurred during the first forty-eight hours in port. While a ship is in open waters, employees on board are lodged in shipboard quarters. When the ship is docked in port, the employees are free to leave the ship during their off-duty hours. At night, the employees have the option of sleeping in their shipboard quarters, or staying at a hotel in town. Shipboard quarters are provided to employees free of charge at all times. Per the CBA, NAVOCEANO will reimburse employees for hotel costs incurred after the first forty-eight consecutive hours in port. Thus, if an employee wishes to stay at a hotel the first night or two in port, the CBA requires that he do so at his own expense. In September of 2007, Mr. Filipczyk was serving on board a ship that docked at Naha, Japan, for three days. Mr. Filipczyk rented a hotel for three nights, September 25-28, one of which nights was during the first forty-eight hours in port. The following month, Mr. Filipczyk's ship docked at Saesbo, Japan, and Mr. Filipczyk rented Government quarters on shore for two nights during the first forty-eight hours in port. Mr. Filipczyk submitted documentation for all of his incurred lodging expenses when he returned to his permanent station at Stennis Space Center in Mississippi. NAVOCEANO refused to reimburse Mr. Filipczyk for the lodging expenses incurred during his first night in Naha and his first two nights in Sasebo. The amount of the non-reimbursed expenses totaled $175.17. Mr. Filipczyk appealed the denial of his reimbursement request to the Civilian Board of Contract Appeals ("CBCA"), alleging violations of the Travel Expense Act 5 U.S.C. §§ 5702(a)(1), (a)(2); 41

C.F.R. § 301-11.3., the Defense Housing Management Manual, 5 U.S.C. § 5911(e), and the Federal Service Labor-Management Relations Act ("FSLMRA") 5 U.S.C. §§ 7101-35. The CBCA dismissed the claim for lack of subject matter jurisdiction, because the claim pertained to a provision of the CBA. The CBA sets forth exclusive administrative procedures for resolving grievances, and appeal to the CBCA is not one of those procedures.

In September of 2008, Mr. Filipczyk filed a compliant in the Court of Federal Claims seeking vacatur of the CBCA's dismissal of his appeal. The Court of Federal Claims dismissed Mr. Filipczyk's complaint for lack of subject matter jurisdiction because the claim did not seek monetary relief as required under the Tucker Act. See 28 U.S.C. § 1491 (a)(1). The Court of Federal Claims also noted in its opinion that it did not have jurisdiction to review decisions of the CBCA. In January of 2009, Mr. Filipczyk filed a second complaint in the Court of Federal Claims seeking money damages in the amount of $175.17, pursuant to the Travel Expense Act, 5 U.S.C. §§ 5702(a)(1) and (a)(2). He also included the allegations previously brought to the CBCA that the travel provision of the CBA violated various federal statutes and regulations.

The Court of Federal Claims found that it did not have jurisdiction to hear Mr. Filipczyk's complaint that the CBA violated the FSLMRA, § 5911(e), or the Defense Housing Management Manual, because none of those sources of law confer a substantive right to money damages against the United States. The

Court of Federal Claims held that the Federal Labor Relations Authority ("FLRA") has exclusive jurisdiction to hear claims related to the FSLMRA, providing an additional reason why the Court of Federal Claims has no jurisdiction to hear that claim. Mr. Filipczyk moved for reconsideration, arguing that the money-mandating Travel Expense Act provides a jurisdictional hook for his non-money-mandating FSLMRA, § 5911(e), and Housing Manual claims. He reasoned that evaluating the legality of the CBA is inseparable from and necessary for determining whether he is entitled to money damages under the Travel Expense Act. See *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997). The Court of Federal Claims denied the motion, and held that Tucker Act jurisdiction requires each claim presented to arise independently from a money- mandating statute. In the alternative, the Court of Federal Claims found that if it possessed jurisdiction over the § 5911(e) claim, then the Government was entitled to summary judgment that the CBA did not violate the cited provision under Court of Federal Claims precedent. Finally, the Court of Federal Claims found that the Government was entitled to summary judgment that the CBA travel provision did not violate the Travel Expense Act. The Court of Federal Claims found that federal agencies have wide discretion in setting per diem allowances. The cited statute and regulation provide for per diem allowances, but do not specify any minimum amount or whether any restrictions may apply. Mr. Filipczyk timely appealed to this court. This court has jurisdiction over appeals from the

Court of Federal Claims under 28 U.S.C. 1295(a)(3). On appeal, Mr. Filipczyk contends that the Court of Federal Claims erred in dismissing his claims under the FSLMRA and Defense Housing Manual, and erred in granting summary judgment as to his claims under the FSLMRA and Travel Expense Act. We address each claim below.

Both parties acknowledge that there were no issues of fact in dispute before the Court of Federal Claims, and that every one of Mr. Filipczyk's claims is properly re-solved as a matter of law. The dispute on appeal is only whether the various legal questions presented were properly decided. We review the Court of Federal Claims' legal conclusions, determinations of jurisdiction, and award of summary judgment without deference. *Pennington Seed, Inc., v. Produce Exch.* No. 299, 457 F.3d 1334, 1338 (Fed. Cir. 2006); *Seuss v. United States,* 535 F.3d 1348, 1359 (Fed. Cir. 2008); City of Tacoma v. Richardson, 163 F.3d 1337, 1339 (Fed. Cir. 1998).

Jurisdictional Dispute

The Court of Federal Claims does not have jurisdiction to prospectively enjoin the enforcement of contracts. Such relief must be obtained from a tribunal with subject matter jurisdiction over the legal challenge to the contract. The tribunal with subject matter jurisdiction over the CBA here is the FLRA. The FLRA was created by Congress for the purpose of enforcing collective bargaining agreements and adjudicating the negotiability of

bargaining terms. It has exclusive jurisdiction to declare certain provisions of such agreements invalid or unenforceable. If an aggrieved party is unsatisfied with the disposition of his claim before the FLRA, he may seek judicial review of the case in a federal appellate court.

U.S.C. § 7123(b). The Government responds to most of Mr. Filipczyk's claims by arguing that the Court of Federal Claims does not have jurisdiction to decide the negotiability of terms under a CBA, whether a CBA violates Department of

Defense housing guidelines, or whether the CBA violates a statutory prohibition against compelling federal employees to rent government quarters. These statutes are not money-mandating, and the Tucker Act itself does not confer any substantive right to relief. The Government concludes that the Court of Federal Claims can only entertain claims that independently arise from a money- mandating statute.

Mr. Filipczyk responds that the Court of Federal Claims has jurisdiction under the money-mandating Travel Expense Act, and thus has jurisdiction over the entire cause, including related claims under laws that are not themselves money-mandating. The Court of Federal Claims rejected Mr. Filipczyk's argument, holding that all claims brought before the Court of Federal Claims must independently relate back to a money-mandating statute. See *Synernet Corp. v. United States*, 41 Fed. Cl. 375, 382 (Ct. Cl. 1998).

It appears to us from the record in this case that the Court of Federal Claims erred in finding that it had no jurisdiction to entertain arguments that were not directly based on a money-mandating statute. Claimants in the Court of Federal Claims may argue issues based on violations of the Constitution or of a statute or regulation to support their claims for monetary relief under money- mandating statutes. Holley, 124 F.3d at 1467 (holding that the Court of Federal Claims had jurisdiction to decide an alleged due process violation related to his claim for damages under a money-mandating statute); see also *Trek Leasing, Inc. v. United States*, 62 Fed. Cl. 673, 677-78 (2004) (holding that the Court of Federal Claims had pendant jurisdiction over a state law contract claim that was part of the same case as a claim over which the Court of Federal Claims had jurisdiction pursuant to 28 U.S.C. § 1498(b)).

The Court of Federal Claims has jurisdiction to consider all of Mr. Filipczyk's arguments directly related to the alleged violation of the Travel Expense Act. This includes jurisdiction over prerequisite questions as to whether the CBA is lawfully enforceable against Mr. Filipczyk for purposes of denying him expenses to which he would otherwise be entitled under the Travel Expense Act. Accordingly, the Court of Federal Claims has jurisdiction to determine whether the CBA violates the Defense Housing Manual, § 5911(e), or the FSLMRA, to the limited extent that such a determination will resolve whether the CBA is a lawful reason to deny Mr. Filipczyk the reimbursement to which he claims to be entitled

under the Travel Expense Act.

FSLMRA

Under 5 U.S.C. §§ 7101-35, commonly known as the FSLMRA, unions and federal agencies must negotiate in good faith over terms and conditions of employment, and those negotiated terms are binding unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation. See 5 U.S.C. § 7117(a)(1). Mr. Filipczyk argues that the negotiated rule against reimbursing lodging expenses incurred within the first forty-eight hours in port is in violation of 5 U.S.C. § 5911(e), the Defense Housing Manual, and the Travel Expense Act, and is thus invalid. If Mr. Filipczyk is correct that the travel provision of the CBA is contrary to one of these laws, then the Court of Federal Claims is authorized to award him damages pursuant to a money mandating statute, in the amount of the travel reimbursement to which he would be entitled but for the invalid CBA. The FSLMRA does not, however, confer on the Court of Federal Claims the authority to enjoin the enforcement of the CBA or award Mr. Filipczyk any other declaratory relief. Such relief must first be sought at the FLRA, and then a proper appellate court. 5 U.S.C. § 7123(b). We thus turn to the contrary provisions of law that Mr. Filipczyk contends invalidate the CBA.

5 U.S.C. § 5911(e)

Since we determine that the Court of Federal

Claims had jurisdiction to decide the issue presented by Mr. Filipczyk regarding the CBA's alleged violation of 5 U.S.C. § 5911(e), we now turn to the Court of Federal Claims' alternative disposition of that issue on the merits. Section 5911(e) prohibits the Government from requiring employees to occupy quarters on a "rental basis."

The Court of Federal Claims found that the CBA provision prohibiting reimbursement of lodging expenses incurred during the first forty-eight hours in port did not violate § 5911(e). The Court of Federal Claims' conclusion relied on its decision in *Boege v. United States*, 206 Ct. Cl. 560, 566 n.4 (1975), which noted that § 5911(e) did not apply to shipboard quarters in a foreign port that are provided free of charge. Mr. Filipczyk cited to the Court of Federal Claims and to this court several decisions by the Government Accountability Office holding under other circumstances that § 5911(e) applies to quarters furnished by the Government, regardless of whether they are provided for free or at cost. See *To the Sec'y of the Air Force*, B-15617, 44 Comp. Gen. 626, 630 (Apr. 15, 1965); *Matter of Fed. Aviation Admin.*: Gov't Quarters, B-195859, 1980 WL 16914, at *4 (Comp. Gen. Mar. 18, 1980). Mr. Filipczyk argues that the Comptroller General's analysis in these opinions is more persuasive than that of the Court of Federal Claims, and asks this court to resolve the apparent conflict in law. Mr. Filipczyk acknowledges, however, that the plain language of § 5911(e) specifying "rental basis" does not on its face include shipboard quarters provided free of charge. Mr. Filipczyk asks this court to take the

extraordinary measure of intentionally looking past the plain language of the statute, and interpreting the language to better comport with what Mr. Filipczyk contends was the intent of Congress in passing the Act. He alleges that the Comptroller General did just this in the cited opinions, and that this court should follow his persuasive example. We do not agree with Mr. Filipczyk that the clear intent of Congress was to include in the scope of § 5911(e) shipboard quarters provided free of charge in a foreign port, especially where employees have the option of staying elsewhere at their own expense. Moreover, we do not agree that interpreting the statute to deliberately reach beyond its plain language is appropriate under the facts of this case.

Defense Housing Manual

Section C5.1.3.1 of the Housing Manual for the Department of Defense provides that Defense personnel staying in transient quarters should have the same quality of furnishing as they would in a good-quality, mid- level hotel. Section C5.1.3.10 defines the services and supplies required to satisfy section C5.1.3.1. Mr. Filipczyk argues that the CBA is invalid because it effectively requires personnel to occupy shipboard quarters that are inferior to a good-quality, mid-level hotel.

The Court of Federal Claims dismissed this claim for lack of subject matter jurisdiction under the same rationale as Mr. Filipczyk's § 5911(e) claim, but did not go on to dispose of Mr. Filipczyk's Housing

Manual claim on the merits in the alternative. Although we determine that the Court of Federal Claims has jurisdiction to consider this claim for the reasons discussed above, we hold that the Government would be entitled to summary judgment that the CBA does not violate the Defense Housing Manual. There is no indication in the record that the CBA is invalid for conflicting with the Defense Housing Manual. Mr. Filipczyk has not alleged sufficient facts that the shipboard quarters provided free of charge and occupied while the ship is in the open waters and during the first forty-eight hours in port constitute transient quarters within the meaning of the Housing Manual, or that they violate the guidelines of the Housing Manual. Nor has he indicated that the guidelines in the Housing Manual are judicially enforceable. There is no indication in the record that even if the CBA deviated from the transient quarters guidelines or any other guidelines in the Housing Manual, it would constitute a violation of a "[f]ederal law or any Government-wide rule or regulation" such that it would invalidate the CBA under the FSLMRA. Accordingly, we conclude that Mr. Filipczyk has not alleged facts sufficient to prove that the CBA is invalid for conflicting with sections C5.1.3.1-10 of the Defense Housing Manual. 5 U.S.C. § 7117(a)(1).

Travel Expense Act

The Travel Expense Act and its accompanying regulation provide that a federal employee traveling on official business away from his designated post of

duty shall be entitled to (a) a per diem allowance (b) reimbursement for actual and necessary expenses or (c) some combination of (a) and (b). 5 U.S.C. § 5702(a)(1); 41 C.F.R. § 301-11.3. The amount of the per diem and the maximum amount of reimbursement are set by other sources of authority. 5 U.S.C. § 5702(a)(2). The Court of Federal Claims found that the denial of Mr. Filipczyk's travel expenses pursuant to the CBA does not violate the Travel Expense Act, because agencies have wide discretion in authorizing travel allowances that they determine to be in the best interest of promoting United States official business. We agree with the Court of Federal Claims that the CBA does not violate the Travel Expense Act. The bargained-for reimbursement provision of the CBA is within the wide discretion granted to agencies under the Travel Expense Act, and is not so unreasonable as to violate the letter or spirit of 5 U.S.C. § 5702(a). Since the CBA is not invalid under any of the other statutes that Mr. Filipzyk cites, it provides a lawful basis for denying Mr. Filipczyk's travel expense reimbursement request. Accordingly, we affirm the Court of Federal Claims' judgment that the Government is entitled to summary judgment that NAVOCEANO's denial of Mr. Filipczyk's reimbursement request was not in violation of the Travel Expense Act.

AFFIRMED

APPENDIX B

In the United States Court of Federal Claims

No. 09-045C
(Filed: September 2, 2009)

RAFAL FILIPCZYK
Plaintiff,
v.
THE UNITED STATES,
Defendant.

Reimbursement of Employee Lodging Expenses When Ship is in Port; Restrictions in Collective Bargaining Agreement; Subject Matter Jurisdiction; Summary Judgment; *Boege v. United States*, 206 Ct. Cl. 560 (1975).

Rafal Filipczyk, appearing pro se, Diamondhead, Mississippi, Plaintiff. Antonia R. Soares, with whom were Tony West, Assistant Attorney General, Jeanne E. Davidson, Director, and Alan J. Lo Re, Assistant Director, United States Department of Justice, Commercial Litigation Branch, Civil Division, Washington, D.C., Robert Young, of Counsel, Naval Meteorology & Oceanography Command, for Defendant.

OPINION AND ORDER

WHEELER, Judge.

This is a civilian pay suit in which pro se Plaintiff Rafal Filipczyk again seeks reimbursement from his employer, the Naval Oceanographic Office ("NAVO"), for lodging expenses of $175.17 incurred when he rented a hotel room after the ship to which he was assigned on temporary duty docked in Japan. NAVO denied him payment based on a provision in the Collective Bargaining Agreement ("CBA") that governs his employment prohibiting reimbursement of hotel expenses for the first 48 hours in which a ship is in port. Mr. Filipczyk has now filed suit in the Court of Federal Claims challenging the legality of the CBA under various statutes and regulations and attempting to recover his lodging expenses. Defendant has filed motions to dismiss Mr. Filipczyk's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Court of Federal Claims ("RCFC"), and the parties have filed cross-motions for summary judgment under RCFC 56. For the reasons stated below, this Court lacks jurisdiction over the majority of Mr. Filipczyk's claims and grants Defendant summary judgment as to the rest. As will be seen, this $175 lawsuit has generated effort and controversy far in excess of the amount at issue.

Background[1]

Mr. Filipczyk is a civilian employee of NAVO, a Defense Department agency located at Stennis Space Center in Mississippi. Compl. ¶ 1, Jan. 22, 2009. On July 28, 2007, Mr. Filipczyk left his permanent duty station and began temporary duty assignment aboard the United States Naval Ship Bowditch ("Bowditch"). Pl.'s Proposed Findings of Uncontroverted Fact ¶ 2, May 22, 2009 ("PPFUF"). After the Bowditch docked in Okinawa, Japan on September 24, 2007, Mr. Filipczyk rented a hotel room for three nights, during September 25-28, 2007. Id. ¶ 3. The Bowditch subsequently docked in Sasebo, Japan, and Mr. Filipczyk obtained lodging in Government quarters for the nights of October 22-23, 2007. Compl. ¶ 4.

On October 30, 2007, Mr. Filipczyk submitted a request to NAVO for reimbursement of his hotel expenses, totaling $175.17. PPFUF ¶ 5. NAVO denied the request based on the CBA between the agency and the American Federation of Government Employees, which governs Mr. Filipczyk's employment. Id. ¶ 6. The CBA contains a provision prohibiting reimbursement of hotel expenses incurred during the first 48 hours that an employee's ship is in port. Def.'s Mot. to Dismiss App. A46, Apr. 3, 2009. It states: "[e]mployees assigned TDY aboard Government ships may utilize, as appropriate, Government or commercial quarters ashore after the

1 The facts discussed in this opinion do not constitute findings of fact by the Court. The facts cited herein are either undisputed or alleged and assumed to be true for the purposes of the pending motions.

ship has been in port during stopovers for forty-eight (48) consecutive hours." Id.

On March 20, 2008, Mr. Filipczyk appealed NAVO's denial of reimbursement to the United States Civilian Board of Contract Appeals ("Board"), alleging violations of 5 U.S.C. § 5702(a)(1) (2006), 5 U.S.C. § 5702(a)(2) (2006), and 5 U.S.C. § 5911(e) (2006). Compl. ¶ 6. The Board dismissed Mr. Filipczyk's claim on June 17, 2008 for lack of subject matter jurisdiction because the CBA did not permit appeal to the Board to resolve grievances. Id. Mr. Filipczyk petitioned the Board for reconsideration on July 14, 2008. Id. On August 27, 2008, the Board granted Mr. Filipczyk's motion to rewrite one sentence of its earlier decision, but upheld its ruling that it did not possess subject matter jurisdiction to hear his claim. Id.

On September 11, 2008, Mr. Filipczyk filed a complaint in the Court of Federal Claims requesting the Court to vacate the Board's denial of subject matter jurisdiction. Id. ¶ 7. Defendant filed a motion to dismiss pursuant to RCFC 12(b)(1) on November 10, 2008. Id. The Court concluded that it lacked subject matter jurisdiction over Mr. Filipczyk's claims because he failed to identify a law conferring a substantive right for money damages against the United States. See *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) (citation omitted). Accordingly, on January 13, 2009, the Court granted Defendant's motion to dismiss Mr. Filipczyk's claims without prejudice. *Filipczyk v. United States*, No. 08-643C, 2009 WL 103740, at *2 (Fed. Cl. Jan. 13, 2009). On January 20, 2009, Mr. Filipczyk filed a

new complaint in the Court of Federal Claims seeking monetary damages against the United States in the amount of $175.17. Compl. ¶ 2. Mr. Filipczyk alleges that: (1) the CBA travel provision upon which NAVO based its denial violates federal statutes and a regulation governing per diem allowances for lodging, namely 5 U.S.C. § 5702(a)(1), 5 U.S.C. § 5702(a)(2), 5 U.S.C. § 5911(e), and 41 C.F.R. § 301-11.3 (2009); (2) the CBA's travel provision also violates § C5.1.3.1 and § C5.1.3.10 of the Department of Defense Housing Management Manual 4165.63-M ("DOD Housing Manual"); and (3) inclusion of the travel provision in the CBA violates federal statutes governing collective bargaining agreements involving federal employees, namely 5 U.S.C. § 7103(a)(12) (2006), 5 U.S.C. § 7103(a)(14)(C) (2006), and 5 U.S.C. § 7117(a)(1) (2006). Id. On April 3, 2009, Defendant filed a motion to dismiss Mr. Filipczyk's complaint for failure to state a claim, pursuant to RCFC 12(b)(6). Defendant argues that the CBA travel provision does not violate any of the federal statutes, regulations, or the DOD Housing Manual Mr. Filipczyk cites. Def.'s Mot. to Dismiss 5. Mr. Filipczyk filed a response in opposition to the motion on April 22, 2009, and Defendant replied on May 7, 2009. On May 7, 2009, Defendant filed a "partial motion to dismiss"2 those of Mr. Filipczyk's claims brought under the Federal Service Labor-Management Relations Act ("FSLMRA"), pursuant to RCFC 12(b)(1). These claims allege that the CBA violates § 7103(a)(12) and § 7103(a)(14)(C) of the FSLMRA. Defendant contends that the Court lacks subject matter jurisdiction over the FSLMRA claims

because the Federal Labor Relations Authority ("FLRA") maintains exclusive jurisdiction of claims brought under the FSLMRA, subject only to limited judicial review by a court of appeals. Def.'s Partial Mot. to Dismiss 4, May 7, 2009. Mr. Filipczyk opposed this assertion in a May 29, 2009 response, and Defendant replied on June 15, 2009.[2]

Mr. Filipczyk filed a motion for summary judgment on May 22, 2009, alleging that no material facts were in dispute, and he was entitled to judgment as a matter of law that the CBA travel provision violated the federal statutes, regulations, and DOD Housing Manual referenced in his complaint. Defendant filed a response and cross-motion for summary judgment on June 22, 2009, and Mr. Filipczyk opposed the cross-motion on July 16, 2009. Defendant replied in support of its cross-motion on August 12, 2009.

Standards of Review

Before this Court are Defendant's motion to dismiss pursuant to RCFC 12(b)(6), Defendant's "partial motion to dismiss" pursuant to RCFC 12(b)(1), and the parties' cross-motions for summary judgment brought under RCFC 56. In this Opinion and Order, the Court disposes of the majority of Mr. Filipczyk's claims on subject matter jurisdiction grounds and the remaining claims on summary

2 In the Court's view, there is no such thing as a "partial motion." Properly styled, Defendant's iling should have been a "motion for partial dismissal." Nevertheless, the Court will refer to this filing with the heading chosen by Defendant.

judgment grounds. Therefore, there is no need for the Court to determine whether Mr. Filipczyk has failed to state a claim under RCFC 12(b)(6).

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction (RCFC 12(b)(1))

When considering a motion to dismiss for lack of subject matter jurisdiction under RCFC 12(b)(1), the Court accepts as true the undisputed allegations in the complaint and draws all reasonable inferences in favor of the plaintiff. Hamlet v. United States, 873 F.2d1414, 1416 (Fed. Cir. 1989) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), abrogated on other grounds by, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). Plaintiff bears the burden of establishing by a preponderance of the evidence the facts sufficient to invoke the Court's jurisdiction. See *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citations omitted). In determining whether Plaintiff has met this burden, the Court may look "beyond the pleadings and 'inquire into jurisdictional facts' in order to determine whether jurisdiction exists." Lechliter v. United States, 70 Fed. Cl. 536, 543 (2006) (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). This Court will dismiss for lack of subject matter jurisdiction only where it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. See *Frymire v. United States*, 51 Fed. Cl. 450, 454 (2002) (citations omitted). In the present case, both Plaintiff and Defendant have submitted evidentiary

documents in support of their pleadings. The Court refers to these materials "to the extent that they allow the court to determine whether it has jurisdiction over this case." *Lechliter*, 70 Fed. Cl. At 543.

B. Motion for Summary Judgment (RCFC 56)

Summary judgment is appropriate under RCFC 56 when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. See RCFC 56(c); *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247 (1986); *Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1323 (Fed. Cir. 2001) (citation omitted). Summary judgment will not be granted if "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248; see also *Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 971 (Fed. Cir. 2001) (citation omitted). In reviewing a motion for summary judgment, the benefit of all presumptions and factual inferences runs in favor of the non-moving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citation omitted); *Lathan Co., Inc. v. United States*, 20 Cl. Ct. 122, 125 (1990) (citation omitted). The moving party bears the initial burden of showing an absence of evidence to support the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-movant must come forward with specific facts that give rise to genuine issues of material facts. RCFC 56(e); Matsushita, 475 U.S. at 587 (citation omitted). Disputes over facts

that might affect the outcome of the case are considered "material." See Liberty Lobby, 477 U.S. at 248. A dispute is "genuine" when a reasonable trier of fact could find in favor of the non-moving party based on the evidence presented. Id. If the non-moving party produces sufficient evidence to raise a genuine issue of fact material to the outcome of the case, the motion for summary judgment should be denied. See id. At 248. With cross-motions for summary judgment, the Court evaluates each motion on its own merits and resolves all doubts and inferences against the party whose motion is being considered. *Tenn. Valley Auth. v. United States*, 60 Fed. Cl. 665, 670 (2004) (citing *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed.Cir.1987)).

Discussion

A. The Court Lacks Subject Matter Jurisdiction Over the Majority of Plaintiff's Claims.

The United States Court of Federal Claims is a court of limited jurisdiction. *Southfork Sys., Inc. v. United States*, 141 F.3d 1124, 1132 (Fed. Cir. 1998). Under the Tucker Act, this Court has jurisdiction "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2006). The Tucker Act,

however, "does not create any substantive right enforceable against the United States for money damages . . . . [t]he Act merely confers jurisdiction upon it whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). A plaintiff coming before this Court, therefore, must identify a separate provision of law conferring a substantive right for money damages against the United States. See *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) (citation omitted). Pro se litigants are afforded considerable leeway in presenting their pleadings to the Court. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (citations omitted). This broad latitude afforded pro se litigants does not, however, exempt them from meeting this Court's jurisdictional requirements. See Henke v. United States, 60 F.3d 795, 799 (Fed. Cir. 1995). Pro se plaintiffs still have the burden of establishing subject matter jurisdiction by a preponderance of the evidence. See *Tindle v. United States*, 56 Fed. Cl. 337, 341 (2003). Further, there is no duty for a court to create any claims that are not spelled out in a plaintiff's pleading. *Scogin v. United States*, 33 Fed. Cl. 285, 293 (1995) (citation omitted). Mr. Filipczyk has filed suit seeking monetary damages under the FSLMRA, 5 U.S.C. § 5911(e), and the DOD Housing Manual, among others. Because none of these statutes, regulations, or the DOD Housing Manual confers a substantive right for money damages against the United States, the Court must dismiss these claims for lack of subject matter jurisdiction pursuant to RCFC

12(b)(1).[3]

1. Plaintiff's FLSMRA Claims

Mr. Filipczyk alleges that the CBA travel provision in question violates several sections of the FSLMRA, a statute that grants federal employees certain rights to organize, bargain collectively, and participate in labor organizations. See 5 U.S.C. § 7101(a)-(b). The specific provisions of the FSLMRA are as follows: (1) § 7103(a)(12), which defines the term "collective bargaining;" (2) § 7103(a)(14), which defines the term "conditions of employment;" and (3) § 7117(a)(1), which states in relevant part: "the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." In its "partial motion to dismiss," Defendant argues that the Court lacks jurisdiction to hear Mr. Filipczyk's FSLMRA claims because the FLRA maintains exclusive jurisdiction over claims brought under the statute, subject only to limited judicial review by a court of appeals. The Court agrees.

Before this Court may evaluate the merits of Mr. Filipczyk's claims, Mr. Filipczyk must establish the Court's jurisdiction. See *Steel Co. v. Citizens for a*

3 Although Defendant's "partial motion to dismiss" for lack of subject matter jurisdiction only addresses Mr. Filipczyk's FLSMRA claims, this Court may, at any time, determine that it lacks subject matter jurisdiction over any claims and dismiss an action.

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See RCFC 12(h)(3). 83, 88-89 (1998). The FSLMRA grants the FLRA exclusive authority to resolve claims brought by individuals under the statute, subject only to limited judicial review in the appropriate court of appeals. See *Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 532-33 (1989); Baker v. Library of Cong., 260 F. Supp. 2d 59, 63 (D. D.C. 2003) (citations omitted); *Mobin v. United States*, 22 Cl. Ct. 331, 334 (1991) (citation omitted). The statute does not create a private cause of action in this Court. *Karahalios*, 489

U.S. at 533. Indeed, the statute provides recourse to courts only in three instances: (1) a person aggrieved by a final order of the FLRA may seek review in the appropriate court of appeals, subject to certain exceptions (§ 7123(a)); (2) the FLRA may seek judicial enforcement of its orders (§ 7123(b)); and (3) the FLRA may petition for temporary injunctive relief upon issuance of a complaint of unfair labor practice to assist the FLRA in the discharge of its duties (§ 7123(d)). § 7123(a), (b), (d); Karahalios, 489 U.S. at 532. Mr. Filipczyk seeks to enforce the duty to bargain in good faith, as set forth in § 7117 of the FSLMRA, but he did not obtain a final order by the FLRA or file a petition in a court of appeals. Because this Court does not have jurisdiction to hear claims over which the FLRA holds exclusive jurisdiction, it must grant Defendant's RCFC 12(b)(1) motion to dismiss. Mr. Filipczyk makes three arguments in opposition to Defendant's motion to dismiss for lack of subject matter jurisdiction: (1) nothing in the FSLMRA explicitly grants the FLRA authority to

resolve claims under § 7117(a), and, therefore, this Court has jurisdiction over his FLSMRA claims because the FLRA does not; (2) the Tucker Act confers jurisdiction to hear his FLSMRA claims; and (3) the Court's ruling on his non-FSLMRA claims will necessarily lead to the resolution of his FSLMRA claims, therefore obviating the need for him to establish jurisdiction under the FSLMRA. These arguments are without merit. A plaintiff bears the burden of affirmatively establishing this Court's jurisdiction by a preponderance of the evidence. See *Reynolds*, 846 F.2d at 748 (citations omitted). Mr. Filipczyk's first assertion that this Court possesses jurisdiction over his FLSMRA claims, simply because the FLRA does not, must fail. The FLRA's inability to resolve Mr. Filipczyk's claims does not speak to this Court's jurisdiction, which is determined by the Tucker Act. Mr. Filipczyk next alleges that § 7117(a)(1) constitutes the money-mandating statute that grants this Court Tucker Act jurisdiction over his FLSMRA claims. Section 7117(a)(1) states, in relevant part: "[T]he duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." § 7117(a)(1). Nothing in this provision indicates an intention to "confer a substantive right to recover money damages from the United States . . . ." *Testan*, 424 U.S. at 398.

Mr. Filipczyk further argues that, because this Court possesses Tucker Act jurisdiction over his

claims based upon the money-mandating federal per diem statute and accompanying regulation (5 U.S.C. § 5702(a)(1), 5 U.S.C. § 5702(a)(2), and 41 C.F.R. § 301-11.3), this Court also has jurisdiction over his FSLMRA claims related to collective bargaining. Alternatively, Mr. Filipczyk contends that the Court can resolve his underlying challenge to the CBA travel provision based on his non-FSLMRA claims, and therefore, he need not show jurisdiction over his FSLMRA claims. These assertions are incorrect. It is settled law that a waiver of the United States' sovereign immunity "'cannot be implied but must be unequivocally expressed.'" Testan, 424 U.S. at 399 (quoting United States v. King, 395 U.S. 1, 4 (1969)). Furthermore, in order for this Court to have jurisdiction, each basis of jurisdiction alleged must independently provide for monetary relief to be paid by the United States. *Synernet Corp. v. United States*, 41 Fed. Cl. 375, 382 (1998), aff'd, 215 F.3d 1348 (Fed. Cir. 1999) (citations omitted). Even if the Court were to reach the merits of his underlying challenge to the CBA travel provision on other grounds, Mr. Filipczyk has plead the FSLMRA claims in his complaint and bears the burden of proving the Court's jurisdiction over them. The FLSMRA is not a money-mandating statute, and therefore, this Court does not have jurisdiction to hear Mr. Filipczyk's FLSMRA claims.

2. Plaintiff's Claim Under 5 U.S.C. § 5911(e)

Mr. Filipczyk contends that the CBA travel provision violates 5 U.S.C. § 5911(e), therefore

entitling him to reimbursement for his travel expenses. § 5911(e) states as follows: "The head of an agency may not require an employee or member of a uniformed service to occupy quarters on a rental basis, unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected, otherwise." § 5911(e). Mr. Filipczyk asserts that this Court has jurisdiction to consider this claim because elsewhere in his complaint, he has invoked 5 U.S.C. § 5702(a) and 41 C.F.R. 301-11.3, which are money-mandating. The Court rejects Mr. Filipczyk's bootstrapping argument. As explained above, *Synernet* made clear that a plaintiff must show that each alleged ground for jurisdiction provides an independent basis for monetary relief against the United States. 41 Fed. Cl. At 382. Indeed, that Court denied a plaintiff's attempt to rely on the Contract Disputes Act as a jurisdictional hook for claims brought under the Administrative Procedures Act. Id. Mr. Filipczyk counters that "the Court cannot be limited to considering only money-mandating provisions." Pl.'s Resp. to Def.'s Cross-Mot. for Summary Judgment 3, July 16, 2009. He maintains that the Court of Claims in *Boege v. United States* relied on the money-mandating section of 5702(a) as the basis for its Tucker Act jurisdiction over an alleged violation of the non-money mandating section of 5911(e), just as he attempts to do here. See 206 Ct. Cl. 560, 566 n.4 (1975). Mr. Filipczyk's interpretation of the law is incorrect. Nothing in Boege indicates that the Court of Claims directly addressed whether the money-mandating

statute relied upon for one claim may also serve as a basis for Tucker Act jurisdiction over a separate claim brought under a non-money mandating statute. Mr. Filipczyk also cites Holley v. United States as an example in which the Federal Circuit considered whether Government actions violated non-money mandating provisions of the Constitution, statutes, and regulations. See 124 F.3d 1462, 1465 (Fed. Cir. 1997). In Holley, the plaintiff sued under 37 U.S.C. § 204 (2006), a money-mandating statute applicable to military personnel seeking damages for wrongful discharge, and raised a constitutional claim under the due process clause for the Army's alleged failure to conduct a hearing prior to discharging him. Id. at 1465-66. The constitutional claim there was "a factor in the claim for which Tucker Act jurisdiction [was] established," rather than an independent one, because it could have given rise to the back pay cause of action. Id. At 1466. By contrast, Mr. Filipczyk's claims under the non-money mandating sources of law constitute independent causes of action and not "factor[s]" in his claims brought under the arguably money-mandating per diem statute and regulation. Therefore, Mr. Filipczyk is required to establish an independent basis of jurisdiction over each of his claims, a step he has failed to meet.

3. Plaintiff's DOD Housing Manual Claim

Mr. Filipczyk alleges that the CBA travel provision violates § C5.1.3.1 and § C5.1.3.10 of the DOD Housing Manual. Section C.5.1.3.1 provides that Defense Department personnel staying in

transient quarters should have the same quality of furnishing as they would in a good quality, mid-level hotel. Def.'s Mot. to Dismiss App. A100. Section C5.1.3.10 defines the services and supplies required for acceptability of transient quarters. Id. App. A102.

Neither of these provisions confers a substantive right for money damages against the United States, and Mr. Filipczyk cannot rely on independent sources of law to provide the jurisdictional hook. See *Todd*, 386 F.3d at 1094 (citation omitted); see also *Synernet*, 41 Fed. Cl. at 382. Therefore, the Court must dismiss his claim under the DOD Housing Manual for lack of subject matter jurisdiction.

B. Even if the Court Has Jurisdiction Over Plaintiff's Claim Under § 5911(e), Defendant is Entitled to Judgment as a Matter of Law.

Even if the Court of Claims erred in Boege in failing to dismiss the plaintiffs' claims under § 5911(e) for lack of subject matter jurisdiction, the Court held that § 5911(e) does not apply on its face to shipboard quarters in a foreign port that are provided free of charge. 206 Ct. Cl. at 564. In Boege, civilian shipboard personnel employed by NAVO challenged NAVO's denial of locality per diem rates for the first three days of in-port stopovers. Id. At 562. The plaintiffs argued that the denial of payment compelled them to occupy government-furnished lodging in violation of § 5911(e), just as Mr. Filipczyk does here. Id. at 563. The Court of Claims found that a simple reading of the statute clearly showed that it applied only to government-furnished quarters on a

rental basis. Id. at 564. The plaintiffs did not dispute that the shipboard quarters were provided free of charge, and therefore, the Court of Claims held that § 5911(e) on its face did not apply. Id. As a result, the Court of Claims concluded that the plaintiffs were not entitled to locality per diem rates for their first three days in port. Id. at 565.

Mr. Filipczyk urges the Court to disregard Boege because the Court of Claims wrongly focused on the phrase "on a rental basis." Mr. Filipczyk cites several decisions by the Government Accountability Office ("GAO") allegedly holding that § 5911(e) applies to all quarters furnished by the Government, not just those provided at cost. See *To the Sec'y of the Air Force*, B-156187, 44 Comp. Gen. 626, 630 (Apr. 15, 1965); *Matter of Fed. Aviation Admin.*: Gov't Quarters, B-195859, 1980 WL 16914, at *4 (Comp. Gen. Mar. 18, 1980). He "claim[s] that the Comptroller General had a better argument" and asks the Court to "revisit the issue and resolve the conflict" with Boege. Pl.'s Resp. to Def.'s Mot to Dismiss 3, Apr. 22, 2009.

The Court rejects Mr. Filipczyk's position. Boege constitutes binding precedent, and therefore, this Court must follow it. See Crusan v. United States, 86 Fed. Cl. 415, 420-21 (2009) ("The United States Court of Federal Claims is required to follow the precedent of . . . the United States Court of Claims.") (citations omitted); Stocum v. United States, 85 Fed. Cl. 217, 222 (2008) (same) (citations omitted). GAO decisions carry some persuasive weight at most. MTB Group, Inc. v. United States, 65 Fed. Cl. 516, 525 (2005) ("[T]he Court of Claims is not bound by the views of the Comptroller General nor do they

operate as a legal or judicial determination of the rights of the parties.") (quoting Burroughs Corp. v. United States, 617 F.2d 590, 597 (Ct. Cl. 1980). Any weight the GAO decisions may have is tempered by the fact that none of them involved shipboard quarters and most were issued prior to Boege. See generally To the Sec'y of the Air Force, 44 Comp. Gen. at 626; To Lieutenant Colonel L.M. Mason, Dep't of the Army, B-169248, 49 Comp. Gen. 815, 815-16 (May 28, 1970); To Mr. Arthur W. Allen, B-170618, 1970 WL 4239, at *1 (Oct. 15, 1970). Furthermore, Mr. Filipczyk's suggestion that the Court of Claims wrongly focused on the phrase "on a rental basis" ignores a cardinal principle of statutory construction that a court should not construe a statute so as to render its words superfluous. TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citations omitted); Walther v. Sec'y of Health & Human Servs., 485 F.3d 1146, 1150 (Fed. Cir. 2007) (citation omitted). When arguing that § 5911(e) applies to all quarters furnished by the Government, Mr. Filipczyk has essentially asked this Court to read out of the statute the term "on a rental basis," which the Court cannot do.

In addition to citing GAO decisions, Mr. Filipczyk points to the definition of "rental quarters" contained in Office of Management and Budget ("OMB") Circular A-45 § 6(j) (1993). OMB Circular A-45 § 6(j) defines "rental quarters" as follows: Except as specifically excluded herein or by statute, the term

"rental quarters," includes all furnished and unfurnished quarters supplied under specific

Government authority to Government employees, contractors, contractor employees, and all other persons to whom housing is provided as an incidental service in support of Government programs. It includes, but is not limited to, Government-owned or -leased dwellings, apartments, bunkhouses, dormitories, trailer pads, cabins, guard stations and lookouts, mobile homes, house trailers, and housekeeping as well as nonhousekeeping units. The term excludes tents, containers, housing which due to extreme deterioration is unsuitable for occupancy except in exigent circumstances, and "public quarters" designated for occupancy by members of the uniformed services with loss of allowances, but it includes quarters occupied by such personnel on a rental basis under 37 U.S.C. section 403(e), 42 U.S.C. subsection 1594a(f) and 1594b, and other authorities.

Def.'s Resp. to Pl.'s Mot. for Summary Judgment App. A118, June 22, 2009. According to Mr. Filipczyk, this language lists examples of rental quarters but does not limit the definition to those cited. Pl.'s Mot. for Summary Judgment 3, May 22, 2009. Therefore, he argues that § 5911(e) stands for the proposition that the Government may not require federal employees to occupy Government quarters free of charge, unless the occupancy is essential to the employee's mission or necessary to protect Government property, as determined by the agency head. Id. Mr. Filipczyk maintains that neither of these exceptions applies. Settled canons of statutory construction dictate that a court must begin its analysis of a statute with the plain language of the text and not resort to other sources of interpretation

unless the text is ambiguous. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, . . . 'judicial inquiry is complete.'") (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)); see also *Mudge v. United States*, 308 F.3d 1220, 1227 (Fed. Cir. 2002) ("It is beyond debate that statutory interpretation begins with the language of the statute.") (citations omitted). The meaning of "on a rental basis" is unambiguous, and Mr. Filipczyk has not argued otherwise. Even if it were appropriate to consult outside sources, it is not clear that the definition of "rental quarters" in OMB Circular A-45 contemplates shipboard quarters. The quarters that meet the definition include dwellings, apartments, bunkhouses, dormitories, trailer pads, and mobile homes, but no mention is made of shipboard quarters. Def.'s Resp. to Pl.'s Mot. For Summary Judgment App. A118. The land-based nature of the rental quarters is also bolstered by language in OMB Circular A-45 making clear that agencies assume a landlord-tenant relationship with personnel who occupy rental quarters. Id. A126.

The Court concludes that U.S.C. § 5911(e) does not apply to Mr. Filipczyk because he was not required to "occupy quarters on a rental basis." Accordingly, Defendant is entitled to judgment as a matter of law on Mr. Filipczyk's § 5911(e) claims.

C. Defendant is Entitled to Summary Judgment on Plaintiff's Remaining Claims.

As to Mr. Filipczyk's remaining claims, Defendant is entitled to summary judgment because the CBA travel provision does not violate 5 U.S.C. § 5702 and its accompanying regulation, 41 C.F.R. § 301-11.3.

1. Plaintiff's Claims Under 5 U.S.C. § 5702

Mr. Filipczyk argues that he is entitled to summary judgment because the CBA travel provision violates 5 U.S.C. § 5702(a)(1) and 5 U.S.C. § 5702(a)(2). These provisions provide as follows:

> (a) (1) Under regulations prescribed pursuant to section 5707 of this title, an employee, when traveling on official business away from the employee's designated post of duty, or away from the employee's home or regular place of business (if the employee is described in section 5703 of this title), is entitled to any one of the following:
> (A) a per diem allowance at a rate not to exceed that established by the Administrator of General Services for travel within the continental United States, and by the President or his designee for travel outside the continental United States;
> (B) reimbursement for the actual and necessary expenses of official travel not to exceed an amount established by the Administrator for travel within the continental United States or an amount established by the President or his designee for travel outside

the continental United States; or

(C) a combination of payments described in subparagraphs (A) and (B) of this paragraph.

(2) Any per diem allowance or maximum amount of reimbursement shall be established, to the extent feasible, by locality. § 5702(a)(1)-(2).

Mr. Filipczyk asserts that these provisions create an entitlement to reimbursement for lodging expenses for all federal employees traveling away from a permanent duty station on official business. Pl.'s Resp. to Def.'s Mot. to Dismiss 6. Furthermore, Mr. Filipczyk maintains that § 5702(a)(1) and § 5702(a)(2) require the Government to prescribe per diem rates based on locality and not by duty stations. Id. 7. By establishing a blanket prohibition on reimbursement during the first forty-eight hours that a ship is in port and doing so based on duty station and not locality, NAVO allegedly has violated the per diem statute. Id. Boege disposes of the argument that NAVO's CBA travel provision violates § 5702. In that case, the Court of Claims recognized the need for agency discretion in determining per diem allowances. See *Boege*, 206 Ct. Cl. at 566 n.4. When analyzing an earlier but comparable version of § 5702, the Court of Claims stated that "[t]here can be little question that [the statute] grants discretion to Government agencies in determining what per diem allowances are applicable to different categories of travel or temporary duty status." Id. The Court rejected the plaintiffs' claim that a new Defense Department directive clarifying the location of a

temporary duty station for purposes of determining the applicable per diem rate ran afoul of § 5702's predecessor. Id. at 567-68. It concluded that the Defense Department did not abuse its discretion when modifying the per diem rate, relying on evidence in the record that reflected "the opinion that shipboard per diem rates should be paid unless civilian personnel were required to maintain commercial quarters ashore." Id. at 567. The Court of Claims opined that "it [was] difficult to see how the agency could have abused its discretion by subsequently modifying the policy to the benefit of plaintiffs" by allowing them to seek locality per diem if their ship was in port beyond three days rather than permitting the abandonment of locality per diem altogether. Id. The CBA travel provision at issue in this case permits a civilian employee to obtain lodging reimbursements after a ship has docked for more than 48 hours and reflects a more liberal policy than the three-day rule affirmed in *Boege*. Therefore, the Court does not find that the CBA travel provision violates § 5702.

Mr. Filipczyk rejects Boege, arguing that the version of § 5702 analyzed by the Court of Claims does not mirror the version in force today. Pl.'s Resp. to Def.'s Mot. to Dismiss 6. He contends that Congress has explicitly taken away the agency discretion to prescribe per diem rates authorized under the previous version of the statute. Id. Mr. Filipczyk has misread § 5702. The old version of § 5702(a)(1) provided that "[a]n employee, while traveling on official business away from his designated post of duty, is entitled to a per diem

allowance prescribed by the agency concerned." Boege, 206 Ct. Cl. at 566 n.4 (quoting § 5702(a)(1) (1975)). While § 5702(a)(1) no longer includes the phrase "prescribed by the agency concerned," see § 5702(a)(1) (2006), it does contain language requiring reimbursement to occur "[un]der regulations prescribed pursuant to section 5707 of this title . . . . ," id. The Court must read the provision in conjunction with § 5707(a)(1), which states that "[t]he Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter . . . ." § 5707(a)(1) (2006). Furthermore, § 5707(a)(1), through Executive Order 12561, delegates to the Secretary of State the authority to establish maximum per diem rates for travel outside the United States. § 5702(a)(1); Exec. Order No. 12561, 51 Fed. Reg. 24,299 (July 1, 1986). Because § 5702(a)(1) allows for agency discretion in setting per diem rates and is materially similar to the statute in place at the time the Court of Claims decided Boege, that case applies equally to the current version of § 5702. Even if discretion to prescribe per diem rates exists, Mr. Filipczyk claims the CBA travel provision "prescribes zero per diem lodging reimbursement rates based on duty station[,] not locality" as required by § 5702(a)(2). Pl.'s Resp. to Def.'s Mot. to Dismiss 7. First, the CBA travel provision does not authorize NAVO civilian employees to secure lodging at Government expense when the ship is in port for three days or less. It only permits reimbursement for lodging after the ship has been in port for forty-eight or more hours. Second, § 5702(a)(2) provides that "[a]ny per diem allowance or

maximum amount of reimbursement shall be established, to the extent feasible, by locality." § 5702(a)(2) (emphasis added). Section 5702(a)(2) expresses a preference for setting per diem rates by locality but does not prohibit an agency from doing so based on duty station, as Mr. Filipczyk suggests.

2. Plaintiff's Claim Under 41 C.F.R. § 301-11.3

Mr. Filipczyk alleges that the CBA travel provision violates 41 C.F.R. § 301-11.3, a regulation promulgated under the Federal Travel Regulation System. The regulation provides that an agency must pay either a per diem allowance or actual expenses unless the employee (1) travels to a training event under the Government Employees Training Act and the employee agrees not to be paid per diem expenses or (2) travels for a pre-employment interview, and the interviewing agency does not authorize payment. 41 C.F.R. § 301-11.3. Just as 5 U.S.C. § 5702 does not grant federal employees a blanket entitlement to reimbursement for all travel expenses incurred as part of official duty, neither does 41 C.F.R. § 301-11.3. The Court of Claims in Boege recognized that 5 U.S.C. § 5702 gives federal agencies discretion to determine per diem allowances. See 206 Ct. Cl. at 566 n.4. Accordingly, it upheld the validity of a Defense Department directive in the face of an earlier version of § 5702 effectively restricting the plaintiffs' travel reimbursement during the first three days in which their ship was at port. Id. at 568. The Administrator of General Services issued 41 C.F.R. § 301-11.3 pursuant to authority granted

under § 5702. Both the statute and its accompanying regulation stand substantively for the same proposition that an agency must pay its employees for costs incurred as part of official travel, except in limited circumstances. In light of this Court's ruling that the CBA travel provision does not violate § 5702, Defendant also is entitled to summary judgment on Mr. Filipczyk's claim under 41 C.F.R. § 301-11.3.

Conclusion

Based upon the foregoing, the Court lacks subject matter jurisdiction to hear Plaintiff's claims brought pursuant to 5 U.S.C. § 7103(a)(12), 5 U.S.C. § 7103(a)(14), 5 U.S.C. § 7117(a)(1), 5 U.S.C. § 5911(e), and the DOD Housing Manual. Accordingly, the Clerk of the Court shall dismiss these claims without prejudice. Furthermore, the Court concludes that there are no genuine issues of material fact, and Defendant is entitled to judgment as a matter of law as to Plaintiff's remaining claims under 5 U.S.C. § 5702(a)(1)-(2) and 41 C.F.R. § 301-11.3. Defendant's motion for summary judgment is therefore GRANTED as to these remaining claims, and the Clerk of the Court is directed to enter judgment in favor of Defendant. No costs.

IT IS SO ORDERED.

/s/ THOMAS C. WHEELER
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2010-5009

RAFAL FILIPCZYK,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 09-CV-045, Judge Thomas C. Wheeler.

ORDER

A petition for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be,

and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 8, 2010.

FOR THE COURT,
/s/ Jan Horbaly [LB]
Jan Horbaly
Clerk

Dated: 10/01/2010

Filed
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
OCT 01 2010
JAN HORBALY
CLERK

cc: Rafal Filipczyk
Antonia R. Soares

FILIPCZYK V US, 2010-5009
(CFC - 09-CV-045)

APPENDIX D

Section 9(h) of the Office of Management and Budget Circular A-45 reads:

9. AGENCY REGULATIONS. The following guidelines must also be observed in establishing charges for rental quarters and related facilities and in developing agency regulations and procedures implementing this circular:

.....

h. Required occupancy. Agency regulations will specify the conditions under which the agency head, or his or her designee, will require occupancy of Government rental quarters, in accordance with the limitations cited in 5 U.S.C. section 5911(e), which provides that employee or member occupancy of rental quarters may not be required unless the agency head determines that necessary service cannot be rendered, or that property of the Government cannot adequately be protected.

Section 7103(a) of Title 5 U.S.C. reads in the relevant parts:

(12) ``collective bargaining'' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either

party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(14) ``conditions of employment'' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practies, and matters--

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;
(B) relating to the classification of any position; or
(C) to the extent such matters are specifically provided for by Federal statute;

Section 7117 of Title 5 U.S.C. reads in the relevant parts:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this

subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

The relevant sections of DoD Instruction 4165.63-M, Housing Management Manual read:

C5.1.3. Transient Unaccompanied Personnel Housing

C5.1.3.1. Personnel staying in transient quarters should have the same quality of furnishings, facilities, and services as they would have in a good quality, mid-level hotel. Managers are required to familiarize themselves with prevailing standards for such hotels and/or motels.

C5.1.3.2. The qualitative criteria in paragraphs C5.1.3.1. and C5.1.3.10. together with the minimum quantitative standards in Table C5.T1. shall determine whether quarters are acceptable or substandard. The minimum standards of acceptability shall apply worldwide.

C5.1.3.10. The following services and supplies are required for acceptability in all transient unaccompanied personnel housing rooms: television, message service, and wake-up service or alarm clock; daily maid service, including making beds, cleaning bathrooms, emptying trash containers and ashtrays, dusting and vacuuming, and changing towels,

washcloth(s), and drinking glass(es), and replenishing soap and issues; and fresh bed linens provided at least once weekly, and upon departure of guests.

Table C5.T1.
MINIMUM STANDARDS OF ACCEPTABLE SPACE AND PRIVACY, EXISTING INVENTORY

Construction Criteria: For unaccompanied personnel housing approved and constructed, or upgraded by major renovation, under criteria exceeding the standards below, the construction criteria are the minimum standards for the facility.

Transient Quarters: The DoD Components, or designee, shall establish minimum standards of acceptable space and privacy which are not greater than for permanent party personnel and not less than shown below for transient personnel.

	Minimum Standards	
Grade	Transient Personnel	Permanent Party Personnel and PCS Students
Officers and civilians: W-3 - W-5, O-3 and above:	250 square feet net living area: private room; private bath	400 square feet net living area: living room, bedroom, private bath; access to kitchen or officers dining facility receiving appropriated fund support.
O-1, O-2, W-1, W-2		250 square feet net living area: sleeping/living room; private bath
E-7 - E-9.	250 square feet net living area: private room; bath shared with not more than one other	270 square feet net living area, private room; private bath
E-5 - E-6.	135 square feet net living area: private room, bath shared with not more than one other	135 square feet net living area: private room, bath shared with not more than one other.
E-1 recruits	72 square feet net living area: open bay, central bath	72 square feet net living area: open bay; central bath
Other E-1; E-2 - E-4.	90 square feet net living area: not more than four to a room, except in open bay central bath.	90 square feet net living area: not more than four to a room, central bath

The net living area of a private room or suite is measured from the inside face of the peripheral wall and includes all such enclosed unshared spaces and partitions. The net living area in a shared room comprises the clear area in the sleeping room allocated for an individual's bed, locker, and circulation; it excludes lounges, bathrooms, hallways, storage area designated for military mobility and/or field gear or equivalent. In open bay, net living area is one equal share per person. The open bay comprises all within the peripheral walls.

The relevant section of Joint Travel Regulations

(2003) reads:

Appendix A
PART 1: DEFINITIONS & ACRONYMS

*GOVERNMENT QUARTERS.

NOTE: Privatized housing, of any style or type and in any location, is not Government quarters.
A. Government Quarters. The following are Government quarters:
1. Sleeping accommodations (including aboard a ship) owned, operated, or leased by the U.S. Government;
2. Lodgings or other quarters obtained by U.S. Government contract;
3. Quarters in a state-owned National Guard camp;
4. Sleeping facilities in a National Guard armory when these facilities actually are used or competent authority directs their use for annual or year-round annual training even though not used;
5. Temporary lodging facilities as defined in this Appendix;
6. Lodging facilities on a U.S. Installation owned and operated by a private corporation, if the use of these facilities is directed by Service regulations;
7. Family-type housing owned or leased by the U.S. Government whether occupied as a guest or as a principal;
and
8. Guesthouses, officers clubs, bachelor quarters, visiting officers' quarters, or similar quarters facilities located at a military activity, quarters

aboard a Corps of Engineers floating plant or a Navy Mine Defense Laboratory offshore platform.

B. Adequacy Standards. Adequacy standards for DOD Services are prescribed by the Office, Secretary of Defense in DOD 4165.63-M, DOD Housing Management (see www.dtic.mil/whs/directives/corres/pdf/416563m_0993/p416563m.pdf), and implemented by appropriate DOD component regulations.

TEMPORARY LODGING FACILITIES. Specifically identified Service-operated interim housing facilities that provide short-term housing accommodations for which a charge is levied, without direct charge against the occupants' quarters allowances. They include guesthouses, except transient visiting officer quarters occupied by official visitors to the installation. NOTE: They do not include facilities used primarily for rest and recuperation purposes, or unaccompanied officer and enlisted quarters.

The relevant Code of Federal Regulations, Title 41 provisions read:

Sec. 301-1.3 Who is eligible for TDY allowances?

This chapter covers the following individuals:

(a) Employees traveling on official business;

.....

Sec. 301-11.5 How will my per diem expenses be

reimbursed?

Per diem expenses will be reimbursed by the:
(a) Lodgings-plus per diem method;
(b) Reduced per diem method;
(c) Conference lodging allowance method (see Sec. 301-74.7 and 301-74.22 of this chapter); or
(d) Actual expense method.

Sec. 301-11.7 What determines my maximum per diem reimbursement rate?

Your TDY location determines your maximum per diem reimbursement rate. If you arrive at your lodging location after 12 midnight, you claim lodging cost for the preceding calendar day. If no lodging is required, the applicable M&IE reimbursement rate is the rate for the TDY location. (See Sec. 301-11.102.)

Sec. 301-11.12 How does the type of lodging I select affect my reimbursement?

Your agency will reimburse you for different types of lodging as follows:

(a) Conventional lodgings. (Hotel/motel, boarding house, etc.) You will be reimbursed the single occupancy rate.

(b) Government quarters. You will be reimbursed, as a lodging expense, the fee or service charge you pay for use of the quarters.

(c) Lodging with friend(s) or relative(s) (with or without charge). You may be reimbursed for additio-

nal costs your host incurs in accommodating you only if you are able to substantiate the costs and your agency determines them to be reasonable. You will not be reimbursed the cost of comparable conventional lodging in the area or a flat ``token'' amount.

(d) Nonconventional lodging. You may be reimbursed the cost of other types of lodging when there are no conventional lodging facilities in the area (e.g., in remote areas) or when conventional facilities are in short supply because of an influx of attendees at a special event (e.g., World's Fair or international sporting event). Such lodging includes college dormi-tories or similar facilities or rooms not offered com-mercially but made available to the public by area residents in their homes.

(e) Recreational vehicle (trailer/camper). You may be reimbursed for expenses (parking fees, fees for connection, use, and disconnection of utilities, electricity, gas, water and sewage, bath or shower fees, and dumping fees) which may be considered as a lodging cost.

Sec. 301-11.100 What will I be paid for lodging under Lodgings-plus per diem?

When travel is more than 12 hours and overnight lodging is required you are reimbursed your actual lodging cost not to exceed the maximum lodging rate for the TDY location or stopover point.

GSA Office of Governmentwide Policy

SEP 21 2000

Mr. S. W. Westbrook
Director
Per Diem, Travel and Transportation
Allowance Committee
Hoffman Building 1, Room 836
2461 Eisenhower Avenue
Alexandria, VA 22331-1300
Dear Mr. Westbrook:

This letter is in response to your July 31, 2000, memorandum requesting a waiver of a Federal Travel Regulation (FTR)(41 CFR chapters 300-304) provision.

You state that the Department of Defense (DoD) has spent many years and millions of taxpayer dollars building and upgrading temporary quarters for use by DoD travelers performing temporary duty travel at installations in the United States, and you would like to limit lodging reimbursement for DoD civilians when Government quarters are available to the civilians.

Therefore, you specifically request a waiver of FTR S301-11-.11, which allows Federal travelers to stay in lodging facilities of their choice. You state that you are requesting a waiver to FTR S301-11.11 in order that the Joint Travel Regulation (JTR) may include

language that limits lodging reimbursement for DoD civilians performing temporary duty travel at installations in the United States.

You state that JTR language would require employees to check for the availability of Government quarters when performing temporary duty travel at installations in the United Sates but they would not be required to use the Government quarters. However, if Government quarters were available on the installation, and other lodgings were used, the employee's lodging reimbursement would be limited to the Government's quarters cost.

GSA is unable to grant your waiver request at this time, as such a waiver would be Contrary to the statutory language and intent of 5 U.S.C. S591(e).

A review of the legislative history and decisions of the Comptroller General reveal that it was the clear intent of Congress in enacting 5 U.S.C. S5911 (e) that employees not be forced to occupy Government quarters on a rental basis. While your proposal would not force the occupancy of Government quarters, per se, employees would in effect be penalized for not choosing to stay in Government quarters, as their travel Reimbursement would be reduced and they would be forced to pay out of pocket expenses to cover the extra costs of the commercial lodging.

Therefore, this waiver cannot be granted, as it would have the de facto effect of forcing Employees to

choose Government quarters, contrary to 5 R.S.C. S5911(e).

Sincerely,

//original signed//
William T. Rivers
Director,
Travel Management Policy

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

RAFAL FILIPCZYK

v.

No. 09-045C

THE UNITED STATES

COMPLAINT

1. I am a civilian employee of the Naval Oceanographic Office ("NAVOCEANO"), located at Stennis Space Center, Mississippi, and a resident of Diamondhead, MS.

2. This is a claim for monetary damages against the United States. The amount of my claim is $175.17, lodging expenses incurred on a temporary duty assignment overseas.

3. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1491(a)(1). The statute mandating payment is 5 U.S.C. § 5702(a)(1). The regulation mandating payment is 41 CFR § 301-11.3 (2007).

4. On July 28, 2007 I left my permanent duty station for a temporary duty assignment aboard an oceanographic vessel, USNS Bowditch. The Bowditch came to port on the island of Okinawa, Japan on

September 24, 2007. While in port, my working hours were from 8:00
a.m. to 4:30 p.m. When off-duty, I spent three nights, September 25-28 in a hotel in Naha, Okinawa. I claimed lodging expenses reimbursement on October 30, 2007. NAVOCEANO refused to reimburse me for expenses of the night of September 25, $135.17. On October 22, 2007 the Bowditch docked in Sasebo, Japan. I spent two nights, October 22-24, in Government quarters on a naval base in Sasebo. NAVOCEANO refused to reimburse me for lodging expenses I incurred for the two nights, in the amount of $40.

5. Denying reimbursement NAVOCEANO violated 5 U.S.C. § 5702(a)(1) and 41 CFR § 301-11.3 (2007). Internal NAVOCEANO regulation, on which the denial was based, NAVOCEANOINST 4650.12 § 15.13.2 (no lodging reimbursement during the first forty- eight hours a ship is in port), violates 5 U.S.C. § 5702(a)(1), (a)(2), § 5911(e), 41 CFR § 301- 11.3 (2003) and DOD Instruction 4165.63-M § C5.1.3.1, § C5.1.3.10 (minimum adequacy standards of lodging facilities for civilian employees). Inclusion of § 15.13.2 in a Collective Bargaining Agreement (2003) ("CBA") violates 5 U.S.C. § 7103(a)(12), (a)(14)(C) and § 7117(a)(1) (provision inconsistent with Federal law and Government-wide regulation, matter specifically provided for in a Federal statute – issue non-negotiable).

6. On March 20, 2008 I filed an appeal with the United States Civilian Board of Contract Appeals

("Board"), pursuant to 31 U.S.C. §3702(a)(3), and claimed, inter alia, violation of 5 U.S.C. § 5702(a)(1), (a)(2), and 5 U.S.C. § 5911(e). I petitioned the Board to direct NAVOCEANO to reimburse me in the amount of $175.17. In June 2008 the Board issued a decision regarding my claim, Rafal Filipczyk, CBCA 1122-TRAV (June 17, 2008), in which it ruled it did not have subject matter jurisdiction over my claim because of the presence of the CBA, 5 U.S.C. § 7121(a)(1). On July 14, 2008 I filed a Request for Reconsideration of the statutory violation part of Board's decision. The Board granted my motion to the extend that one sentence was rewritten but did not change its holding regarding subject matter jurisdiction, Rafal Filipczyk, CBCA 1122-TRAV (August 27, 2008).

7. On September 11, 2008 I petitioned this Court to review Board's jurisdiction decision and remand the case to the Board pursuant to the Tucker Act and the Remand Act of 1972. My complaint was dismissed without prejudice for lack of subject matter jurisdiction, Rafal Filipczyk v. United States, Fed. Cl. No. 08-643C (January 13, 2009).

WHEREFORE, I ask the Court to review the administrative record and for a monetary award in the amount $175.15 (lodging expenses I incurred) plus the costs of this action.

Dated: 20 January, 2009

/s/ Rafal Filipczyk

Rafal Filipczyk
Plaintiff
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Diamondhead, MS 39525
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